Re Yong Tet On Paul, ex p Chung Khiaw Bank Ltd

HIGH COURT (KOTA KINABALU) — BANKRUPTCY PETITION NO 89 OF 1985
IAN CHIN J
14 OCTOBER 1995

Bankruptcy *— Receiving and adjudication orders — Motion to set aside orders — Whether court has discretion not to set aside orders which were a nullity — Whether debtor duty bound to obey orders — Whether it was an abuse of the process of the court to use a motion to challenge the decision of a court of competent jurisdiction — Whether there were any factors to move the court to exercise its discretion to set aside the orders — Bankruptcy Act 1967 ss 92(1) & 105(1)*

In 1984, Chung Khiaw Bank Ltd, Hong Kong ('the creditor') obtained two judgments against Paul Yong ('the debtor') and these were registered with the High Court on 30 July 1984. The debtor applied unsuccessfully to set aside the registration. On 15 March 1985, two bankruptcy notices ('the notices') were served on the debtor. Though applications were taken out to set aside the notices, these were withdrawn. A petition to have the debtor adjudged a bankrupt was opposed by the debtor but the court on 30 April 1986 dismissed the objection and made orders of receiving and adjudication ('the orders') against the debtor. There was no appeal against this decision of the High Court. The orders were served on the debtor on 15 October 1986. In 1987, the debtor then applied to set aside the notices and the orders under ss 92(1) and 105(1) of the Bankruptcy Act 1967 ('the Act') on the ground that the interest was not quantified or ascertained, but the application was dismissed on 10 November 1988 by the High Court and the appeal to the Supreme Court against the decision was withdrawn by the debtor. On 7 August 1991, the debtor took out the present motion to set aside the orders. It was adjourned and was finally heard on 18 September 1995.

Held, dismissing the motion:

(1) As the word 'may' is used in ss 92(1) and 105(1) of the Act, the court has a discretion whether or not to annul the orders where the bankruptcy notices and consequently the orders were a nullity (see p 726A); *Re Douglas Tay Guan Shung, ex p the Government of Malaysia* [1994] 3 CLJ 111 and *Re Hester, ex p Hester* (1889) 22 QBD 632; [1886–1890] All ER Rep 865 followed.

(2) It was established law that a person against whom an order of court had been issued was duty-bound to obey that order until it was set aside (see p 726C–D); *Wee Choo Keong v MBf Holdings Bhd & Anor* [1993] 2 MLJ 217 followed; *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 not followed.

(3) The debtor was attempting by the present motion to challenge a decision of a court of competent jurisdiction, which decision the

debtor did not pursue the appeal he had filed, and the motion was thus an abuse of the process of the court (see p 727A).

(4) There were no factors which should move the court in exercising its discretion in the debtor's favour. The debtor in his affidavit never explained whether he could settle the judgment debt or whether he was going to. He never explained why he only took out the present motion on 7 August 1991 when he was adjudged a bankrupt more than four years earlier on 30 April 1986 (see p 727B).

(5) In exercising the discretion, it was relevant for the court to bear in mind the that commercial morality of our country and thus the interests of the public, which would include that of the creditors, ought to be considered (see pp 727C and 728C); *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, *Re Seow Yin Fong* [1994] 2 CLJ 845 and *Re Hong Kim Sime* (Bankruptcy Petition No 140 of 1993, 5 August 1994, High Court, Tawau, unreported) followed.

(6) In this case, the debtor had not even filed his statement of affairs with the Official Assignee. He ran up debts which he did not bother to pay and he cared not to tell the court how he proposed to settle his debts. This was surely not conduct which the court approved of. Further, the debtor had dragged all his creditors into court time after time with his fruitless or aborted litigation, and thus put not only the creditors to great expense but the taxpayers as well. The debtor, in the absence of evidence to the contrary, could rightly be said to be hopelessly insolvent (see p 729B).

[Bahasa Malaysia summary

Dalam tahun 1984, Chung Khiaw Bank Ltd, Hong Kong ('si piutang itu') telah memperolehi dua penghakiman terhadap Paul Yong ('penghutang itu') dan kedua-dua penghakiman ini telah didaftarkan dengan Mahkamah Tinggi pada 30 Julai 1984. Penghutang itu telah gagal dalam permohonan untuk mengenepikan pendaftaran tersebut. Pada 15 Mac 1985, dua notis kebankrapan ('notis-notis tersebut') telah disampaikan ke atas penghutang itu. Walaupun permohonan dibuat untuk mengenepikan notis-notis tersebut, ianya telah ditarik balik. Satu petisyen supaya penghutang itu dijatuhkan hukuman sebagai bankrap telah ditentang oleh penghutang itu, tetapi mahkamah menolak bantahan itu pada 30 April 1986 dan membuat perintah-perintah penerimaan dan penghukuman ('perintah-perintah itu') terhadap penghutang itu. Tiada rayuan dibuat terhadap keputusan Mahkamah Tinggi ini. Perintah-perintah itu telah disampaikan ke atas penghutang itu pada 15 Oktober 1986. Dalam tahun 1987, penghutang itu kemudiannya memohon untuk mengenepikan notis-notis tersebut dan perintah-perintah itu menurut ss 92(1) dan 105(1) Akta Kebankrapan 1967 ('Akta itu') atas alasan

bahawa faedah telah tidak dijumlahkan atau pun dipastikan, tetapi permohonan itu telah ditolak oleh Mahkamah Tinggi pada 10 November 1988 dan rayuan yang dikemukakan kepada Mahkamah Agung terhadap keputusan ini telah ditarik balik oleh penghutang itu. Pada 7 Ogos 1991, penghutang itu memulakan usul sekarang untuk mengetepikan perintah-perintah itu. Usul itu telah ditangguh dan akhirnya didengar pada 18 September 1995.

Diputuskan, menolak usul itu:

(1) Oleh kerana perkataan 'boleh' digunakan dalam ss 92(1) dan 105(1) Akta itu, mahkamah mempunyai budi bicara sama ada atau tidak untuk membatalkan perintah-perintah itu di mana notis-notis kebankrapan dan oleh yang demikian perintah-perintah itu adalah tidak sah (lihat ms 726A); *Re Douglas Tay Guan Shung, ex p the Government of Malaysia* [1994] 3 CLJ 111 dan *Re Hester, ex p Hester* (1889) 22 QBD 632; [1886–1890] All ER Rep 865 diikut.

(2) Adalah undang-undang mantap bahawa seseorang yang telah dikeluarkan dengan satu perintah mahkamah wajib mematuhi perintah tersebut sehingga perintah itu diketepikan (lihat ms 726C–D); *Wee Choo Keong v MBf Holdings Bhd & Anor* [1993] 2 MLJ 217 diikut; *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 tidak diikut.

(3) Penghutang itu membuat percubaan, melalui usul sekarang ini, untuk mencabar satu keputusan yang dibuat oleh sebuah mahkamah yang mempunyai bidang kuasa kompeten. Penghutang itu tidak meneruskan dengan rayuan yang difailnya terhadap keputusan itu dan oleh itu, usul ini adalah satu penyalahgunaan proses mahkamah (lihat ms 727A).

(4) Tiada faktor-faktor yang patut memujuk mahkamah supaya melaksanakan budi bicaranya dengan memihak kepada penghutang itu. Penghutang itu tidak menerangkan dalam afidavitnya sama ada dia boleh menjelaskan hutang penghakiman itu atau sama ada dia akan berbuat demikian. Dia juga tidak pernah menjelaskan mengapa dia cuma memulakan usul sekarang ini pada 7 Ogos 1991 walhal dia telah dihukum seorang bankrap lebih daripada empat tahun yang lalu pada 30 April 1986 (lihat ms 727B).

(5) Dalam melaksanakan budi bicaranya, adalah relevan untuk mahkamah mengingati bahawa prinsip moral perdagangan negara ini dan dengan itu kepentingan awam, yang merangkumi kepentingan si piutang-si piutang, hendaklah dipertimbangkan (lihat ms 727C dan 728C); *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, *Re Seow Yin Fong* [1994] 2 CLJ 845 dan *Re Hong Kim Sime* (Petisyen Kebrankapan No 140 tahun 1993, 5 Ogos 1994, Mahkamah Tinggi, Tawau, tidak dilaporkan) diikut.

(6) Dalam kes ini, penghutang itu belum pun memfailkan pernyataan hal ehwalnya dengan Pegawai Pemegang Harta. Dia mengambil tanggungan hutang-hutang yang dia tidak berusaha membayar balik dan dia tidak peduli untuk memberitahu mahkamah bagaimana dia bercadang untuk menjelaskan hutang-hutangnya. Ini tentunya bukan kelakuan yang disenangi oleh mahkamah. Lagipun, penghutang itu telah berkali-kali mengheret kesemua si piutangnya ke mahkamah dengan litigasinya yang sia-sia atau digugurkan dan dengan demikian bukan sahaja banyak membazirkan wang si piutangnya tetapi juga wang pembayar-pembayar cukai. Penghutang itu, tanpa sebarang bukti yang menunjukkan sebaliknya, wajar dikatakan betul-betul tak solven (lihat ms 729B).]

Notes

For cases on receiving and adjudication orders, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1610–1611.

Cases referred to

Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors [1991] 2 MLJ 327

Chong Chin Shoong v Development & Commercial Bank Bhd [1990] 1 MLJ 285

Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37

Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal [1991] 1 MLJ 426

Ghazali bin Mat Noor v Southern Bank Bhd and four other appeals [1989] 2 MLJ 142

Hester, Re, ex p Hester (1889) 22 QBD 632; [1886–1890] All ER Rep 865

Hong Kim Sime, Re (Bankruptcy Petition No 140 of 1993, 5 August 1994, High Court, Tawau, unreported)

Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263

Seow Yin Fong, Re [1994] 2 CLJ 845

Tay Guan Shung Douglas, Re, ex p the Government of Malaysia [1994] 3 CLJ 111

Telescriptor Syndicate Ltd, Re [1903] 2 Ch 174

Tractors (M) Bhd v Charles Au Yong [1982] 1 MLJ 320

Wee Choo Keong v MBf Holdings Bhd & Anor [1993] 2 MLJ 217

Legislation referred to

Bankruptcy Act 1967 ss 92(1), 105(1)

Bankruptcy Act 1883 [UK] s 35

SA Wong (*Skinner Lind Willie Wong & Chin*), *Roderic Fernandez* (*Shelley Yap Leong Chong Tseu & Chia*) and *Maureen Lind* (*Lind & Co*) for the creditors.

Ho Kin Kong (*Ho Chong Yong & Vanugopal*) for the debtor.

Ian Chin J:

History

The chronology began with the year of 1984 when Chung Khiaw Bank Ltd, Hong Kong ('the creditor') obtained two judgments against Paul Yong Tet On ('the debtor') and these were, on 30 July 1984, registered with the High Court, Kota Kinabalu. The debtor applied unsuccessfully to set aside the registration. On 15 March 1985, two bankruptcy notices were served on the debtor. Though applications were taken out to set aside the bankruptcy notices, these were withdrawn. A petition to have the debtor adjudged a bankrupt was opposed by the debtor but the court, on 30 April 1986, dismissed the objection and made orders of receiving and adjudication ('the said orders') against the debtor. There was no appeal against this decision of the High Court. The said orders were served on the debtor on 15 October 1986. The debtor then, in 1987, applied to set aside the bankruptcy notices and the said orders under ss 92(1) and 105(1) of the Bankruptcy Act 1967 ('the Act') on the ground that the interest was not quantified or ascertained but the application was, on 10 November 1988, dismissed by the High Court and the appeal to the Supreme Court against the decision was withdrawn by the debtor. On 7 August 1991, the debtor took out the present motion (dated 28 January 1993) to set aside the said orders. It was only fixed for hearing on 1 March 1993, but was adjourned. It was finally heard by me on 18 September 1995, where after hearing arguments I dismissed the motion. The following are the grounds for my decision.

The contentions

Mr Ho Kin Kong, learned counsel for the debtor, submitted that the failure to comply with the bankruptcy notices cannot amount to acts of bankruptcy upon which the said orders were made because the judgment debt was not quantified. Mr Ho then urged the court to exercise its discretion, which he conceded the court has, to set aside the said orders on the ground that the bankruptcy notices were a nullity ab initio and that a failure to comply with them cannot be acts of bankruptcy and a petition founded upon such acts must necessarily fail, citing *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263, *Ghazali bin Mat Noor v Southern Bank Bhd and four other appeals* [1989] 2 MLJ 142, *Chong Chin Shoong v Development & Commercial Bank Bhd* [1990] 1 MLJ 285 and *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426. Since there is no argument to the contrary, I assume that the bankruptcy notices and the said orders in our case were a nullity. Though Mr Ho had said that the court has a discretion, he cited authorities which seem to suggest that the debtor is entitled ex debito justitiae to have the said orders set aside. In this regard, learned counsel cited *Ban Hin Lee Credit Sdn Bhd v Utama Computer Centre Sdn Bhd & Ors* [1991] 2 MLJ 327 (Edgar Joseph Jr J) but that case concerned the renewal of a prohibitory order. Since the existence of a discretion appears to have been questioned, albeit obliquely, I thought it best I address myself the issue. So, does the court have a discretion whether to annul or not the said orders where the

bankruptcy notices and, consequently, the said orders were a nullity? I am of the view that the court has. Since in ss 92(1) and 105(1) of the Act, the word 'may' is used, as opposed to the word 'shall' in various other sections of the Act, I am of the view that a discretion has been conferred on the court (*Re Douglas Tay Guan Shung, ex p the Government of Malaysia* [1994] 3 CLJ 111; *Re Hester, ex p Hester* (1889) 22 QBD 632; [1886–1890] All ER Rep 865 are two cases which say the court has a discretion) notwithstanding the nullity of the said orders.

As for *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37, I assume learned counsel meant to submit that the bankruptcy notices and the said orders need not be obeyed but this case must now be read in the light of what was said recently in the Supreme Court case of *Wee Choo Keong v MBf Holdings Bhd & Anor* [1993] 2 MLJ 217 at p 220 viz:

> Obedience to court order
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> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied.

Ms SA Wong, learned counsel for the creditor, submitted that the motion ought to be dismissed. One of the grounds for dismissal is that it is an abuse of the process of the court for the debtor to have made the present application because the debtor, as adverted to earlier, had in 1987 made a similar application to annul and rescind the said orders which application was dismissed by the High Court and the debtor's appeal against the decision to the Supreme Court was withdrawn. The present application, submitted learned counsel, is a collateral attack upon the final decision of a court of competent jurisdiction, citing *Tractors (M) Bhd v Charles Au Yong* [1982] 1 MLJ 320 at p 321, where it is said:

> In our judgment the Malacca action is tantamount to a collateral attack upon a final decision of a court of competent jurisdiction. Since writing this judgment we have come across a decision of the House of Lords on this very point in *Hunter v Chief Constable of the West Midlands Police* [1981] 3 WLR 906 where a civil case was started obviously to try and overrule a decision of a criminal court. There Lord Diplock said at p 914:
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> > 'My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the present case.'
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> He then cited with approval the following passage(s) as expressing the principle to be followed by the courts:
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> > '... the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court' (per AL Smith LJ in *Stephenson v Garnett* [1898] 1 QB 677 at pp 680–681).

A I agree with learned counsel that the debtor is attempting by the present motion to challenge a decision of a court of competent jurisdiction which decision the debtor did not pursue the appeal he had filed and the motion is an abuse of the process of the court.

In any event and since the court has a discretion, I cannot see any B factors in favour of the debtor that should move the court in exercising its discretion in his favour. All the debtor said in his affidavit was that the proceedings were, for the reasons already mentioned, invalid. He never explained whether he could settle the judgment debt or whether he was going to. He never explained why he only took out the present motion on 7 August 1991, when he was adjudged a bankrupt more than four years C earlier on 30 April 1986. As for the exercise of the discretion, it is relevant to bear in mind the commercial morality of our country. This is how Buckley J in *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, *The Digest* (Vol 4(2)) para 4286 said:

> D Where application is made in bankruptcy to annul an adjudication, the court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case. The court has to exercise a discretion. E It is bound to regard not merely the interests of the creditors; it has a duty with regard to the commercial morality of the country.

Therefore, the interests of the public ought to be considered and this was recognized even earlier in *Re Hester, ex p Hester* cited by Ms SA Wong, where, when considering the discretion under s 35 of the English Bankruptcy F Act 1883, which material part is similar to that in our Act, it is, at p 633, said:

> ... The language of s 35 is somewhat vague, and I think it was ... intended that the application should be made on purely technical grounds, which might or might not have been successful at the time when the order was made, but that the words were meant to apply to larger objections — more G equitable objections — such, for instance, as that the matter cannot be successfully worked out in bankruptcy, that the objects of the law of bankruptcy cannot be sufficiently attained by an adjudication, and that there are reasons why, in the interest of all the creditors, and without detriment to the public, the adjudication may be annulled. I think the section gives the court a very wide discretion.

H and at p 635, the court said:

> If the debtor goes on, the creditors who were aware of his position will put pressure upon him, and their solicitors will get their costs, but the creditors themselves will be no nearer getting paid their debts than they were before. I On the other hand, if persons among the public who are ignorant of the debtor's deplorable position, can be found to trust him, then, no doubt, he may raise money by means of which he can pay his existing creditors. But that can only be done by taking advantage of the want of guile of the future creditors who are to trust him. That is really what this proposal comes to.

> 'Let me go on and see if I cannot get some of my creditors something more than if my business is wound up now.' We should not be doing our duty to the community if we were to sanction the rescission of the receiving order. To my mind, this man is hopelessly insolvent. Without any estimate, even by himself, much less by any competent person, of his present position — his assets and liabilities — he asks us to take for granted that, if he is allowed to go on, he will be able to pay his creditors in full. I am perfectly certain that he will not. He will probably succeed in very much enlarging the area of his indebtedness, but I am pretty certain that he will not diminish it ...

In that case, despite the consent of the creditors, the court refused to annul the receiving order. The interest of the community, which would include that of the creditors, should be taken into account (*Re Seow Yin Fong* [1994] 2 CLJ 845). I have also, in the case of *Re Hong Kim Sime* (Bankruptcy Petition No 140 of 1993, 5 August 1994, High Court, Tawau, unreported) expressed a similar sentiment in a matter relating to an application for a stay of a bankruptcy petition which is no less applicable to this case and what I said there are in the following terms:

> The needs of society sometimes influence the development of the common law (and the enactment of statutes) and thus influence the exercise of judicial discretion. That is, the law is oftentimes reflective of what society thinks a society should be and this includes how its populace should behave (like for example, coming to court with a clean hand). It also takes cognizance of the economic needs of the times (like for example, construing a contract to give it business efficacy and the granting of Mareva and other injunctions). Therefore, and it is trite law, that the particular facts and circumstances of a case and the needs of society will have to be considered when deciding whether to grant a stay ...
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> ... It is unfortunate that our courts, including the highest court of the land, had seen quite a lot of cases pertaining to bankruptcy proceedings. This case will, as of right of the debtor, also end up in the appellate court if there is an appeal which brings me to the question why a debtor who does not or cannot dispute the debt owing is allowed to make use of the courts in this way and, as a result thereof, wastes the taxpayers' money as well (because it is from the taxes that the judges and staff are paid) in his effort to avoid the consequence of his not paying the debt. I am of the view that the bankruptcy laws ought to be changed to prevent a debtor who does not or cannot dispute a debt from asserting that a bankruptcy notice or a bankruptcy petition is void (for failure to comply with the bankruptcy rules). If this is not done, a recalcitrant debtor, ensconcing in the cradle of the legal process, would rather decimate his assets by expending money on legal proceedings than pay the creditors. This is surely not what the bankruptcy law intends and not what society approves. It is also not consonant with goods business ethics which society aspires for, which is that one must pay what one owes. Just because there is an appeal on a serious point of law, assuming it is such, it cannot justify a stay; it is less so in our case when the debt is not disputed. It does no good to the image of our country as a rising economic power to countenance debtors who not only do not pay their debts but can involve their creditors in costly litigation. The judicial stance should be to discourage such debtor from wasting the precious time of the court notwithstanding the penal nature of bankruptcy proceedings (actually, more beneficial than penal in that bankrupts could be discharged after

A paying ten cent for every dollar owed when the body of creditors agreed and in most cases they agree to put an end to the matter) ...

In our case, the debtor had not even filed his statement of affairs with the Official Assignee. He runs up debts which he does not bother to pay and he cares not to tell the court how he proposes to settle the debt. This is B surely not conduct which the court approves of. Worst of all, the debtor managed to drag all his creditors into court time after time with his fruitless or aborted litigation and thus put not only the creditors to great expense, but the taxpayers as well. His indebtedness ten years ago, to just one creditor, was RM2,323,599.17 not including interest. He, in the absence of evidence to the contrary, can rightly to be said to be hopelessly C insolvent. The court should not let him loose and set him upon the unwary businessmen to get credit and to incur more debts.

Conclusion

I therefore dismiss the motion with costs.

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Motion dismissed.

Reported by Alexandra Wong

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